

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DELAWARE INSTITUTE OF)
HEALTH SCIENCES, INC.,) C.A. No. 10A-08-001 JTV
)
Appellant,)
)
v.)
)
DELAWARE STATE BOARD)
OF NURSING,)
)
Appellee.)

Submitted: April 15, 2011

Decided: July 29, 2011

Laraine A. Ryan, Esq., Wilmington, Delaware. Attorney for Appellant.

Patricia Davis Murphy, Esq., Department of Justice, Dover, Delaware. Attorney for Appellee.

*Upon Consideration of Appellant's
Appeal From Decision of
Delaware State Board of Nursing*
AFFIRMED

VAUGHN, President Judge

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. Nursing education programs in this state must be approved by the Delaware State Board of Nursing.¹ The Board also has the authority to withdraw approval if a program is not maintaining standards established by statute or by the Board.² This is an appeal by the Delaware Institute of Health and Sciences ("DIHS" or "the school") from a decision by the Board to withdraw approval of that institution's nursing school. The decision to withdraw the school's approval came after what the record in this case indicates were five contentious years from the time the school initially sought approval until approval was ultimately withdrawn.

2. On January 29, 2007,³ the Board granted initial approval for DIHS to operate its nursing school.⁴ Soon after, the Board determined that the school had

¹ 24 Del. C. § 1919. Pursuant to that authority, the Board has issued regulations governing nursing educational programs. 24 Del. Admin. C. § 1900-2.0 *et. seq.* For clarity, these regulations will be referred to in the text of this opinion by the word "Rule" followed by the appropriate section number. (e.g. 24 Del. Admin. C. § 1900-2.0 is referred to as Rule 2.0). The regulations will be cited in standard Bluebook format in footnotes.

² *Id.*

³ The parties disagree on the date, as the Board states in its brief that initial opinion was sent out in a letter dated January 27, 2007.

⁴ A nursing program that has received conditional approval may begin admitting students. Final approval requires compliance with a number of Board regulations.

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committed numerous violations of Board regulations.⁵ As a result, the Board placed DIHS on conditional approval in June 2008. Conditional approval is a probationary status for programs that are found to be deficient in a specified area.⁶

3. The Board remained unsatisfied with the appellant's progress. Board members visited the school on April 22, 2009 in order to validate the school's compliance with regulations. Numerous deficiencies were discovered. As an example, appellant's students reported the existence of a school policy providing that students would be "sent home" if they failed to maintain an eighty percent average. However, the policy was not contained in a student handbook as required by Rule 2.5.5.4. It was also determined that the Board admitted students with entrance exam scores that were below its published requirement for admission. Additionally, it was determined that instructors had been assigned classes that they were unqualified to teach because they had no experience with the topics they were assigned. Finally, the visiting Board members found that the appellant was not providing internet access to its students for research purposes as it claimed. The lack of internet access troubled the Board because the school has no library and relies entirely on internet sources to

⁵ The alleged violations will be set forth and examined hereinafter.

⁶ 24 Del. Admin. C. § 1900-2.1. The Board notified appellant that its status had been changed to conditional approval because of: (1) its failure to provide information about the qualifications of faculty members and which courses they taught; (2) appellant's failure to renew cooperative agreements with hospitals that provide clinical support; and (3) the fact that only 28.57 percent of appellant's first graduating class had obtained a passing score on the State's nursing licensure exam. Appellant was directed to take prompt action in order to correct the deficiencies.

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provide a means of research to students.⁷

4. During the Board's July 2009 meeting, it decided to hold a hearing to determine whether to withdraw approval of the appellant's program. It sent a letter, dated August 28, 2009, to provide notice. The letter listed five specific areas of action items which the school was required to address and correct, with a due date for each one in either September or October, 2009.⁸ During its October monthly meeting, the Board found that none of those actions had been completed before their respective deadlines. Nonetheless, the Board did not propose to withdraw approval at that time and gave the appellant another opportunity to comply.

5. On February 8, 2010 the Board sent the appellant a letter giving notice that it would hold a hearing on March 3, 2010 in order to determine whether to withdraw its approval of the appellant's nursing program. The letter was seven, single spaced pages recounting a history of the relationship between the school and the Board, setting forth many shortcomings on the part of the school, and explaining that the hearing would be held due to the appellant having failed to comply with Board regulations and to take action to bring itself into compliance as directed. The letter specifically informs the appellant that the hearing was necessary because it had

⁷ Nursing programs are required to provide access to research tools to students under 24 Del. Admin. C. § 1900-2.5.10.6.5.

⁸ Specifically, appellant was directed to: (1) develop a systematic plan of evaluation as soon as possible and no later than close of business on October 1, 2009; (2) provide an updated action plan for compliance with Board regulations no later than September 4, 2009; (3) provide a corrected 2008 Academic Year Annual Report by September 4, 2009; (4) provide a six month progress report by September 4, 2009; (5) and provide a 2009 Academic Year Annual Report by October 1, 2009.

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failed to provide: faculty qualifications, curriculum planning, information about the grading system, and policy statements. The hearing was held over the course of two Board meetings in March and May 2010. The Board issued a formal order on July 14, 2010 withdrawing approval from the school.

6. In its papers filed with this Court, the appellant makes a wide-ranging attack upon the Board. The issues raised, however, can be grouped into three categories. First, the appellant contends that the Board's order is not supported by substantial evidence. Second, the appellant contends that the Board failed to meet its burden of proof. Third, the appellant argues that the Board violated its due process rights by withdrawing conditional approval.

7. The appellee contends that the record is filled with examples of the appellant's deficiencies in operating a nursing school. The Board contends that the appellant has manipulated the burden of proof, improperly attempting to place it on the Board. Lastly, the Board contends that the appellant was afforded every available due process protection.

8. The Court has appellate jurisdiction over final agency decisions pursuant to 29 *Del. C.* § 10142. An administrative board's final decision should be affirmed as long as there is substantial evidence to support the board's decision and the ruling is free from legal error.⁹ Substantial evidence has been defined as such relevant evidence as is adequate to lead a reasonable mind to support the board's conclusion.¹⁰

⁹ 29 *Del. C.* § 10102(4).

¹⁰ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

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This Court gives the board great deference when its decision is based on factual determinations,¹¹ as well as in situations where it is interpreting its own rules.¹² In fact, when the focus of the appeal is the administrative agency's application of its own rule "the agency action shall be presumed to be valid and the complaining party shall have the burden of proving either that the action was taken in a substantially unlawful manner and that the complainant suffered prejudice thereby, or that the regulation, where required, was adopted without reasonable basis on the record or is otherwise unlawful."¹³

9. The Board may withdraw approval of a nursing program if it finds that the program has failed to comply with relevant laws or Board regulations.¹⁴ The Board found several regulatory violations: (1) failure to provide progress reports;¹⁵ (2) failure to provide adequate research resources;¹⁶ (3) failure to maintain a qualified director;¹⁷ (4) failure to provide qualified faculty;¹⁸ and (5) maintaining unwritten

¹¹ 29 *Del. C.* § 10142(d).

¹² *Reybold Group v. Pub. Serv. Comm'n*, 2007 WL 2199677, at *5 (Del. 2007).

¹³ *Id.*

¹⁴ 24 *De. Admin. C.* § 1900-2.2.1.4.

¹⁵ 24 *Del. Admin. C.* § 1900-2.4.3.1.

¹⁶ 24 *Del. Admin. C.* §1900-2.5.8.3.1., 2.5.8.3.2., and 2.5.10.6.5.

¹⁷ 24 *Del. Admin. C.* § 1900-2.5.3.2 and 2.5.3.1.4.

¹⁸ 24 *Del. Admin. C.* § 1900-2.5.3.2. and 2.5.3.1.5.

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school policies.¹⁹ I will address each finding.

10. The Board found that appellant failed to submit progress reports as required by Rule 2.4.3.1. That rule provides that a nursing program that has obtained initial approval must submit a progress report to the Board every six months. The report is supposed to include the number of students enrolled, attrition rate, faculty credentials, curriculum design, and use of clinical facilities.

11. Here, there is no dispute that the appellant failed to provide timely and complete reports. Appellant argues that it did ultimately provide most of the required information to the Board. However, it was incomplete. For example, the appellant provided the names of faculty members on several occasions, but ignored the Board's repeated requests to explain which classes each faculty member would teach and how that faculty member was qualified to teach it. The Board clearly determined that a faculty member's professional experience is a necessary part of his or her "credentials." The Board's finding that DHIS violated Rule 2.4.3.1 is supported by substantial evidence and is free of legal error.

12. The Board found that the appellant failed to provide access to research information and learning sources. Rules 2.5.8.3.1 and 2.5.8.3.2 provide that the school's library shall have recent, pertinent and sufficient holdings to meet the learning needs of students and faculty, and that the facilities and policies shall be conducive to effective use. Rule 2.5.10.6.5 provides that programs must provide

¹⁹ 24 Del. Admin. C. § 1900-2.5.5.4.

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adequate resources for “cognitive learning and clinical practice.”²⁰ Failure to comply with Rule 2.5.10.6.5 can result in conditional approval (probation), subject to a reasonable period of time to correct deficiencies. The Board has interpreted the rule to mean that a nursing program must have a library or provide access to electronic databases on the internet.²¹ The Board determined that the appellant did not provide consistent internet access to its students, as the appellant claimed in its submissions to the Board. The Board determined this fact after conducting a site visit and interviewing students. The Board was in a much better position than this Court, on appeal, to measure the credibility of the students who reported the lack of internet service. I am satisfied that the Board’s finding that the requirements of these rules were violated is supported by substantial evidence and is free of legal error.

13. The Board determined that the appellant violated several rules by failing to maintain a qualified program director. Rule 2.5.3.2 provides that the director and each faculty member shall be academically and professionally qualified for the position to which he or she is appointed. Rule 2.5.3.1.4 provides that a director of a qualified nursing program shall hold a minimum of a Master’s degree.

14. In this case, the appellant had a series of program directors. Elsie Hartigan was appellant’s first program director. She resigned after four months. Appellant proposed to appoint Dana Baker as its new program director. However, it

²⁰ 24 Del. Admin. C. § 1900-2.5.10.6.5.

²¹ The Court should defer to that interpretation because it is not arbitrary or capricious to interpret “resources for cognitive learning” as library or internet research materials.

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did not comply with the Board's requests to provide information about Baker's qualifications. Next, appellant appointed Soji Brooks as its program director. However, the Board determined that Brooks was not qualified to be program director because she did not hold a master's degree. Appellant continued to operate without a program director. The Board cited that deficiency in its August 29, 2008 letter as a ground for withdrawing the appellant's approval to operate a nursing program. Appellant failed to cure the deficiency before the Board's decision to withdraw approval. The Board was clearly troubled by the appellant's inability to maintain a qualified program director over a period of several years. It provided the appellant with notice of the deficiency and an opportunity to cure it. The evidence supports the Board's finding that the appellant's inability to maintain a qualified director violated Rule 2.5.3.2.

15. Similarly, the Board determined that the appellant violated Rule 2.5.3.2 by refusing to submit necessary information to determine whether faculty members were qualified to teach their assigned classes. Rule 2.5.3.2 provides that the director and each faculty member shall be academically and professionally qualified for the position to which he or she is appointed.²² A related regulation requires instructors to be certified Delaware nurses and possess at least bachelors degrees in nursing.²³

16. Appellant argues that its teachers were qualified to teach any nursing classes because they maintained the minium requirements of having nursing degrees

²² 24 Del. Admin. C. § 1900-2.5.3.2.

²³ 24 Del. Admin. C. § 1900-2.5.3.1.5.

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and were certified Delaware nurses. Appellant argues that it was improper for the Board to seek information about the instructors' experience and qualifications to teach specific classes because a nursing degree and certification are all that should be required. However, I see no error in the Board's position that experience in an area, in addition to academic training, is relevant to a teacher's qualifications. The Board gave the appellant due notice that it interpreted Rule 2.5.3.2 to require instructors to have relevant professional experience. Such a requirement is reasonable and it is a fair interpretation of the rule. Appellant's refusal to submit the information as requested undermined the Board's regulatory function by making it impossible to determine whether the instructors were qualified. The evidence supports the Board's finding that the appellant violated Rule 2.5.3.2.

17. The Board determined that the appellant violated Rule 2.5.5.4 by maintaining an unwritten and sporadically enforced policy providing that students would be made to "go home" if they failed to maintain an eighty percent average on tests. Rule 2.5.5.4 provides that nursing schools must specify new policies in a student handbook before such policies are enforced.²⁴ The Board discovered the vague "go home" policy when interviewing students during a site visit conducted on April 22, 2009. It is undisputed that the "go home" policy was not contained in a student handbook. In fact, the Board found that the appellant did not even have a current student handbook. The appellant denies the existence of such a policy. However, the Board interviewed students who verified to the satisfaction of the Board

²⁴ 24 Del. Admin. C. § 1900- 2.5.5.4.

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its existence. Moreover, the appellant's chief administrator gave testimony at the Board's March 2010 meeting vaguely acknowledging that the policy may have been implemented to some degree. Under the circumstances, the Court finds ample evidence to support the Board's finding that appellant violated Rule 2.5.5.4.

18. Appellant's second contention is that the Board failed to meet its "burden of proof" for withdrawing approval. This argument is without merit. Pursuant to 29 *Del. C.* 10125©, the burden of proof is always on the applicant rather than the regulator in administrative hearings. Appellate review exists in order to ensure that agency decisions are supported by substantial evidence.

19. Appellant's third contention is that the Board violated its due process rights by withdrawing approval despite appellant's attempts to comply with Board regulations. 24 *Del. C.* § 1919(b) sets forth the procedure which the Board is to follow when deciding whether to withdraw approval from a nursing program that has violated the law or Board regulations.²⁵ It provides that the Board shall give written notice of the deficiencies and a time for correcting them before withdrawing approval.²⁶ It further provides that the Board shall grant a hearing and extend the time for compliance upon written application when good cause is shown.²⁷

20. In this case, the appellant received due process because it was given notice and an opportunity to cure as required by statute. The Board sent the appellant

²⁵ 24 *Del. C.* § 1919(b).

²⁶ *Id.*

²⁷ *Id.*

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several letters explaining that it would withdraw approval unless the appellant brought itself into compliance. The Board sent a letter to the appellant in August 2009 describing the reasons for its decision to consider withdrawing approval. The letter set forth deadlines for eliminating the violations. The Board sent an additional letter in February 2010 explaining that it would hold a hearing in March 2010 to consider withdrawing approval of the appellant's program because the appellant had failed to bring itself into compliance with Board regulations as outlined in the August letter. I find that the appellant received due process.

21. For the foregoing reasons, the Board's July 14, 2010 order is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
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